Carver Vs. Jackson

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Decided On : 1830

Appeal No. : 29 U.S. 1

Appellant : Carver

Respondent : Jackson

Judgement :

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Carver v. Jackson

29 U.S. (4 Pet.) 1

ERROR TO THE CIRCUIT COURT OF THE UNITED

STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

SYLLABUS

The practice of bringing the whole of the charge of the court delivered to the jury in the court below for review before this Court is unauthorized and extremely inconvenient both to the inferior and to the appellate court. With the charge of the

court to the jury upon mere matters of fact and with its commentaries upon the weight of evidence this Court has nothing to do.

Observations of that nature are understood to be addressed to the jury merely for their consideration as the ultimate judges of the matters of fact, and are entitled to no more weight or importance than the jury in the exercise of their own judgment choose to give them. They neither are nor are understood to be binding on them as the true and conclusive exposition of the evidence.

If, in summing up the evidence to the jury, the court should

misstate the law, that would justly furnish a ground for an exception. But the exception should be strictly confined to that misstatement, and by being made known at the moment, would often enable the court to correct an erroneous expression, so as to explain or qualify it in such manner as to make it wholly unexceptionable or perfectly distinct.

The plaintiff claimed title under a marriage settlement purporting to be executed

13 January, 1758, by an indenture of release between Mary Philipse, of the first part, Roger Morris, of the second part, and Joanna Philipse and Beverly Robinson of the third part whereby, in consideration of a marriage intended to be solemnized between Roger Morris and Mary Philipse, &c.;, R.M. and M.P. granted, &c.;, to J.P. and B.R.

"in their actual possession now being, by virtue of a bargain and sale to them thereof made for one whole year, by indenture bearing date the day next before the date of these presents and by force of the statute for transferring uses into possessions, and to their heirs, all those,"

&c.;, upon certain trusts therein mentioned. This indenture, signed and sealed by the parties and attested by the subscribing witnesses to the sealing and delivery thereof, with a certificate of William Livingston, one of the witnesses, and the execution thereof before a judge of the supreme court of the State of New York

dated 5 April, 1787, and of the recording thereof in the secretary's office of New York, was offered in evidence by the plaintiff, and objected to, on the ground that the certificate of the execution was not legal and competent evidence and did not entitle the plaintiff to read the deed without proof of its execution. A witness was sworn who proved the handwriting of William Livingston and of the other subscribing witness, both of

whom were dead. The certificate of the judge of the supreme court of New York stated that William Livingston had sworn before him, that he saw the parties to the deed "sign and seal the indenture, and deliver it as their and each of their voluntary acts and deeds," &c.;

By the Court:

"According to the laws of New York, there was sufficient *prima facie* evidence of the due execution of the indenture, not merely of the signing and sealing, but of the delivery, to justify the court in admitting the deed to be read to the jury, and that in the absence of all controlling evidence, the jury would have been bound to find that the deed was duly executed."

The plaintiff in the ejectment derived title under the deed of marriage settlement of 15 January, 1758, executed by Mary Philipse, who afterwards intermarried with Roger Morris, and by Roger Morris and certain trustees named in the same. The premises, before the execution of the deed of marriage settlement, were the property of Mary Philipse in fee simple. The defendant claimed title to the same premises under a sale made thereof as the property of Roger Morris and wife by certain commissioners acting under the authority of an act of the Legislature of New York passed 22 October, 1779, by which the premises were directed to be sold as the property of Roger Morris and wife, as forfeited, Roger Morris and wife having been declared to be convicted and attainted of adhering to the enemies of the United States. Not only is the recital of the lease in the deed of marriage settlement evidence between the original parties to the same of the existence of the lease, but between the parties to this case the recital is conclusive evidence of the same, and superseded the necessity of introducing any other evidence to

establish it.

The recital of the lease in the deed of release in the present case was conclusive evidence upon all persons claiming under the parties in privity of estate, as those in this case claim. And independently of authority, the court would have arrived at the same conclusion upon principle.

As to the law of estoppels.

Leases, like other deeds and grants, may be presumed from long possession which cannot otherwise be explained, and under such circumstances a recital in an old deed of the fact of such a lease having been executed, is certainly

presumptive proof or stronger in favor of such possession under title than the naked presumption arising from a mere unexplained possession.

The uses declared in a deed of marriage settlement were to and for the use of Joanna Philipse and Beverly Robinson (the releasees) and their heirs, until the solemnization of the said intended marriage, and from and immediately after the solemnization of the said intended marriage, then to the use and behoof of the said Mary Philipse and Roger Morris, and the survivor of them, for and during the time of their natural lives, without impeachment of waste, and from and after the determination of that estate, then to the use and behoof of such child or children, as shall or may be procreated between them, and to his, her, or their heirs and assigns forever. But in case the said Roger Morris and Mary Philipse shall have no child or children begotten between them, or that such child or children shall happen to die during the lifetime of the said Roger and Mary, and the said Mary should survive the said Roger without issue, then to the use and behoof of her, the said Mary Philipse, and her heirs and assigns forever. And in case the said Roger should survive the said Mary Philipse without any issue by her or that such issue is then dead without leaving issue, then after the decease of the said Roger Morris, to the only use and behoof of such person or persons, and in such manner and form as the said Mary Philipse shall at any time during the said intended marriage

desire the same by her

last will and testament, &c.; The marriage took effect, children were born; all

before the attainder of their parents in 1779. Mary Morris survived her husband

and died in 1825, leaving her children surviving her. This is a clear remainder in fee to the children of Roger Morris and wife, which ceased to be contingent on the birth of the first child and opened to let in after born children.

It is perfectly consistent with this limitation that the estate in fee might be defeasible and determinable upon a subsequent contingency, and upon the happening of such contingency might pass by way of shifting executory use to other persons in fee, thus making a fee upon a fee.

The general rule of law founded on public policy is that limitations of this nature shall be construed to be vested when and as soon as they may vest. The present limitation in its terms purports to be contingent only until the birth of a child, and may then vest. The estate of the children was contingent only until their birth, and when the confiscation act of New York passed, they being all born, it was a vested remainder in them and their heirs, and not liable to be defeated by any transfer or destruction of the life estate.

The Act of the Legislature of New York of May 1, 1786, gave to the purchasers of forfeited estates the like remedy in case of eviction, for obtaining compensation for the value of their improvements, as is directed in the Act of 12 May, 1784. The latter act declares that the person or persons having obtained judgment against such purchasers shall not have any writ of possession, nor obtain possession of such lands, &c.;, until he shall have paid to the purchaser of such lands or person holding title under him the value of all improvements made thereon, after the passing of the act. *Held* that claims of compensation for improvements made under the authority of these acts of the Legislature of New York are inconsistent with the provisions of the Treaty of peace with Great Britain of 1783, and should be rejected.

That in all cases, a party is bound by natural justice to pay for improvements on land made against his will or without his consent is a proposition which the Court is not prepared to admit.

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In the Circuit Court for the Southern District of New York, an action of ejectment was instituted by the defendant in error for the recovery of a tract of land in the Town of Carmel, in the County of Putnam in the State of New York. The plaintiff claimed title on the demise of John Jacob Astor and others, named in the case. The action was tried by a jury at October term, 1829, in the circuit court in the City of New York, and a verdict and judgment rendered for the plaintiff in the same, a bill of exceptions was tendered by the defendant in the circuit court, who prosecuted this writ of error.

After judgment was rendered for the plaintiff in the circuit court, he prayed the court to order a writ of possession to cause him to have possession of the premises, and thereupon James Carver suggested to the court that Roger Morris and Mary Morris his wife, under whom the plaintiff in ejectment claimed, were for fifteen years and upwards next before 22 October, 1779, in possession of a large tract of land in the then County of Dutchess in the State of New York, including the premises. That on 22 October, 1779, the Legislature of the State of New York, by "an act for the forfeiture and sale of the estate of persons who have adhered to the enemies of the state, &c.;" declared Roger Morris and his wife to be convicted and attainted of adhering to the enemy, and all their estate, real and personal, severally and respectively, in possession, reversion, or remainder was forfeited and vested in the people of the state. That commissioners appointed under this act, on 16 November, 1782, sold, disposed of, and conveyed the land in question in this suit to Timothy Carver, his heirs and assigns, for consideration of seventy-one pounds. That by an act of the Legislature of 12 May, 1784, and an act of 1 May, 1786, it was among other things provided that where judgment in a due course of law should be obtained for any lands sold by the commissioners of forfeitures against any person who derived title thereto under the people of the

state or the commissioners,

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the person who obtained judgment should not have a writ of possession or obtain possession of the land until he or she should have paid to the person in possession under said title the value of all improvements made thereon, to be estimated as provided in the acts. That he, the said Timothy Carver, purchased the property held by him in the full confidence that he obtained a perfect indefeasible title to the land in fee simple, entered forthwith into possession of the same, made great, valuable, and permanent improvements on the land, which are now in value upwards of $2,000, by which the lands are enhanced in value to that sum and upwards. That Timothy Carver afterwards conveyed the premises to James Carver, the defendant in ejectment, who also made other valuable improvements on the land, before the commencement of this suit, of the value of $2,000 and upwards. That this action has been commenced and prosecuted and a recovery has been had on a ground of title reciting the same; that the Act of the Legislature of New York passed 22 October, 1779, for the forfeiture of estates, &c.;, did not take from the plaintiff in the suit the title to the premises after the death of Roger Morris and wife, both of whom were deceased at the time of the institution of this suit. So that the plaintiffs were the owners of the land in fee and entitled to recover the possession of the same. And the defendant insists that, under the provisions of the several acts of the Legislature of New York, he ought to be paid the value of the improvements made on the lands; that no writ of possession should issue until the same was paid; and he prays the court to stay the plaintiff from the writ, or from having possession of the lands, until the value shall be paid, and that commissioners may be appointed to ascertain the said value.

The plaintiff did not deny the facts alleged by the defendant, but he denied the right of the defendant to be paid for the improvements and insisted on his right at law to a writ of possession and to the possession of the land without paying the value of the improvements. The court held that the matters suggested by the defendant and admitted by the plaintiff were not sufficient to bar or stay the plaintiff

from

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having his writ of possession or possession of the land without paying the whole or any part of the value of the improvements estimated or valued in any way whatever, and that the plaintiff should have a writ of possession to cause him to have possession of the lands.

The bill of exceptions set forth the whole proceedings on the trial of the cause and that an agreement had been entered into by the parties to it that the plaintiff is not entitled to the recovery of the property unless it should satisfactorily appear in the suit, in addition to whatever else may be necessary to authorize a recovery therein, that the whole title, both in law or equity, which may or can have been vested in the children and heirs of Roger Morris and Mary his wife of, in, or to the premises or lands in question in the suit has been, as between the grantors and grantees, legally transferred to John Jacob Astor, one of the lessors of the plaintiff, his heirs and assigns, nor unless a proper deed of conveyance in fee simple from John Jacob Astor and all persons claiming under him to the people of the State of New York would be valid and effectual to release, transfer, and extinguish all the right, title, and interest which now is or may have been vested in the children and heirs of Roger Morris and wife.

The plaintiff in the ejectment gave in evidence a patent from William III to Adolphe Philipse, dated 17 June, 1692, for a large tract of land, including the premises, and proved the descent of the same to Frederick Philipse, and that Mary Philipse, who afterwards intermarried with Roger Morris, was a devisee in tail with other children of Frederick Philipse, and by subsequent proceedings in partition, and by a common recovery Mary Philipse became seized in fee simple of one equal undivided part of the land granted by the patent, and that afterwards, on 7 February, 1754, a deed of partition reciting the patent and the title of the heirs was executed between the children and devisees and heirs of Frederick Philipse by which the portions severally belonging to them were set apart and divided to each in severalty, one portion being allotted to Mary Philipse, the land in controversy

being included in the land surveyed

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and held under the patent and deed of partition. The part allotted to Mary Philipse in the partition was No. 5.

The plaintiff then offered to read in evidence a deed of marriage settlement, dated 13 January, 1758, intended to convey all the land in No. 5, between Mary Philipse, of the first part, Roger Morris of the second part, Joanna Philipse and Beverly Robinson of the third part, on the back of which deed was endorsed a certificate in the following terms:

"Be it remembered that on 1 April, 1787, personally came and appeared before me John Sloss Hobart, one of the justices of the supreme court of the State of New York, William Livingston, Esq., Governor of the State of New Jersey, one of the subscribing witnesses to the within written indenture, who being by me duly sworn, did testify and declare that he was present at or about the day of the date of the within indenture, and did see the within named Joanna Philipse, Beverly Robinson Roger Morris, and Marry Philipse, sign and seal the same indenture, and deliver it as their and each of their voluntary acts and deeds, for the uses and purposes therein mentioned, and I having carefully inspected the same, and finding no material erasures or interlineations therein other than those noted to have been made before the execution thereof, do allow the same to be recorded. John Sloss Hobart."

Upon the back of the deed was also endorsed a certificate of the recording thereof, in the following words:

"Recorded in the Secretary's Office of the State of New York in deed book commencing 25 November, 1774, page 550. Examined by me this 11 April, 1787. Robert Harpur, D. Secretary."

To which said evidence so offered the counsel for the defendant objected upon the ground that the certificate was not legal and competent evidence to be given to the

jury, and did not entitle the plaintiff to read the deed in evidence without proof of its execution, and that the certificate was not sufficient, inasmuch as it did not state that William Livingston testified or swore that he was a subscribing witness to the deed. The parts of the deed of 13 January, 1758, material to the case are the following:

"This indenture, made 13 January in the thirty-first

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year of the reign of our sovereign lord, George II, by the grace of God, of Great Britain, France, and Ireland, King, defender of the faith, &c.;, and in the year of our Lord 1758, between Mary Philipse of the first part, Major Roger Morris of the second part, and Joanna Philipse and Beverly Robinson of the third part, witnesseth that in consideration of a marriage intended to be had and solemnized between the said Roger Morris and Mary Philipse and the settlement hereafter made by the said Roger Morris on the said Mary Philipse, and for and in consideration of the sum of five shillings, current money of the province of New York, by the said Joanna Philipse and Beverly Robinson to her, the said Mary Philipse, at or before the ensealing and delivery of these presents, well and truly paid, the receipt whereof is hereby acknowledged, and for divers other good causes and considerations her thereunto moving, she, the said Mary Philipse, hath granted, bargained, sold, released, and confirmed, and by those presents doth grant, bargain, sell, release, and confirm unto the said Joanna Philipse and Beverly Robinson (in their actual possession now being by virtue of a bargain and sale to them thereof made for one whole year by indenture bearing date the day next before the day of the date of these presents, and by force of the statute for transferring of uses into possession) and to their heirs all those several lots or parcels of land, &c.;,"

describing the property, in which is included the land in controversy in this suit.

"To have and to hold all and singular the several lots of land, &c.;, and all and singular other the lands, tenements, hereditaments, and real estate, whatsoever of

her the said Mary Philipse, &c.;, unto the said Joanna Philipse and Beverly Robinson and their heirs, to and for the several uses, intents, and purposes, hereinafter declared, expressed, limited, and appointed and to and for no other use, intent, and purpose whatsoever; that is to say to and for the use and behoof of them the said Joanna Philipse and Beverly Robinson and their heirs until the solemnization of the intended marriage, and to the use and behoof of the said Mary Philipse and Roger Morris and the survivor of them for and during

the term of their natural lives, without impeachment of waste, and from and after the determination of that estate, then to the use and behoof of such child or children as shall or may be procreated between them, and to his, her, or their heirs and assigns forever; but in case the said Roger Morris and Mary Philipse shall have no child or children begotten between them, or that such child or children shall happen to die during the lifetime of the said Roger and Mary and the said Mary should survive the said Roger without issue, then to the use and behoof of her, the said Mary Philipse, and her heirs and assigns forever, and in case the said Roger Morris should survive the said Mary Philipse without any issue by her or that such issue is then dead without leaving issue, then, after the decease of the said Roger Morris, to the only use and behoof of such person or persons and in such manner and form, as she, the said Mary Philipse, shall at any time during the said intended marriage devise the same by her last will and testament, which last will and testament, for that purpose, it is hereby agreed by all the parties to these presents that it shall be lawful for her at any time during the said marriage to make, publish and declare the said marriage, or anything herein contained, to the contrary thereof in any wise notwithstanding, provided nevertheless, and it is the true intent and meaning of the parties to these presents, that it shall and may be lawful, to and for the said Roger Morris and Mary Philipse, jointly, at any time or times during the said marriage, to sell and dispose of any part of the said several lots or parcels of land, or of any other her lands, tenements, hereditaments and real estate whatsoever, to the value of 3,000, current money of the province of New York, and in case the said sum of 3,000 be not raised by such sale or sales

during their joint lives, and they have issue between them, that then it shall be lawful for the survivor of them to raise the said sum by the sale of any part of the said lands, or such deficiency thereof as shall not then have been already raised thereout, so as to make up the said full sum of 3,000, anything hereinbefore contained to the contrary thereof in any wise notwithstanding. "

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The court overruled the objection and allowed the deed to be read in evidence, and the counsel for the defendant excepted to the same.

Evidence was then given by the testimony of Mr. Hoffman to prove the death of William Livingston and Sarah Williams, who were witnesses to the deed, and that the names of those persons were their proper handwriting. That Mary Philipse and Roger Morris intermarried and had four children, all born before October, 1779; also the death of some of the children; the intermarriage of others; that Joanna Philipse was the mother of Mary Morris and Susanna Robinson wife of Beverly Robinson; that Beverly Robinson died between 1790 and 1795; that Roger Morris died in 1794, and his wife Mary Morris died in 1825. Evidence was also given to show that Roger Morris was in possession of the premises from 1771 to 1774.

The plaintiff then gave in evidence a conveyance by lease and release of the premises, *inter alia,* by the heirs and legal representatives of Roger Morris and wife to John Jacob Astor.

The conveyance by the commissioners of forfeited estates to Timothy Carver of the land was then given in evidence by the plaintiffs and by Timothy Carver and wife to the defendant.

Mr. Barclay proved that Roger Morris and his family left this country for England just before the evacuation of the City of New York by the British troops in 1782 or 1783, and that neither of them had since returned to the United States.

The plaintiff here rested his case.

And thereupon the counsel of the defendant objected and insisted that (independent of any other questions that might arise upon the plaintiff's case) unless the deed, commonly called a marriage settlement deed, which had been given in evidence, was accompanied or preceded by a lease, the plaintiff could not recover in this action; that without such lease, the deed could only operate as a deed of bargain and sale, and the statute of uses would only execute the first use to the bargainees, Joanna Philipse and Beverly Robinson who took the legal estate in the land; and that the children of

the said Roger Morris and his wife took only trust or equitable interests, and not the legal estate in lands; and that the plaintiff could not recover, because such lease had not been produced, nor its absence accounted for, if one existed, and of this opinion was the court.

The counsel for the plaintiff then offered to give evidence to the court to prove the loss of the said lease, to lay the foundation for secondary evidence of its contents, by showing that diligent search for such lease had been made in various places, without being able to find the same; to which evidence the counsel for the defendant objected on the ground that such evidence did not go to prove the loss or destruction of the lease, but to show that none ever existed, and that before the plaintiff could give such or any other evidence of the loss of the lease, he must prove that a lease did once exist.

The counsel for the plaintiff then offered to give evidence to show that diligent efforts had been made in England and in the United States to find the lease, without success, which was objected to by the defendant on the ground that such evidence did not go to prove the loss or destruction of the lease, but to show that none ever existed, and that before such evidence was given, it must be proved that a lease did once exist. The court overruled this objection, considering the recital in the release *prima facie* evidence for the purpose, and the plaintiff gave the evidence. To this decision in overruling the objections and admitting the evidence the counsel for the defendant excepted.

Testimony was then offered and admitted to prove that it was the almost universal practice not to record the lease when the conveyance was by way of lease and release. This evidence was given by the testimony of persons who had examined the offices of record, and not by that of those who kept the records. The counsel for the defendant objected to this evidence, alleging that the facts asserted could only be proved by the persons who had the custody of the records, but this objection was overruled, and the same was excepted to.

Here the plaintiff again rested the proofs as to the loss of

the lease, and offered to give secondary evidence to the jury of its previous existence and contents. The counsel for the defendant objected and insisted that the plaintiff had not sufficiently proved the loss of the lease, and was not entitled to go into secondary evidence of its previous existence and contents.

But the court overruled the objections, and was of opinion that the plaintiff had, from the evidence, satisfied the court as to the loss and nonproduction of the lease, and was entitled to give secondary evidence of its contents, to which opinion and decision the counsel for the defendant also excepted.

The counsel for the plaintiff, for the purpose of proving to the jury the existence and contents of the lease, offered to read in evidence to the court and jury the recital contained in the said release or marriage settlement deed of a lease or bargain and sale for a year, to which evidence so offered as aforesaid the counsel for the defendant objected on the ground that the said recital was not evidence for those purposes against the defendant.

But the court overruled the objections and permitted the recital to be read in evidence to the jury to prove the existence and contents of the lease, to which opinion and decision the counsel for the defendant also excepted.

The plaintiff then offered, and gave in evidence, by the testimony of Mr. Benson and Mr. Troup, that William Livingston, who had witnessed the deed of release,

was an eminent lawyer in the City of New York, where the deed was executed, and that it was the practice at that time to employ lawyers to draw deeds; that it was usual to recite the lease in the deed of release; that it was a frequent practice in New York to convey lands by lease and release until within four years of the Revolution. Evidence was also offered and admitted by the books of record to show what was the usual form and contents of lease. To all this testimony the counsel for the defendant excepted.

The printed journal of the House of Assembly of New York for the year 1787 was then admitted in evidence under an exception by the counsel for the defendant. It

showed that on 16 February, 1787 a petition had been presented by Joanna Morris on behalf of herself, her brothers and sisters, children of Roger Morris and Mary his wife, relative to the estate forfeited to the people of the State of New York by the attainder of their parents, and a report thereon to the legislature, and here the plaintiff rested his case.

The defendant gave evidence to prove that Timothy Carver, and himself under him, had been in possession of the premises since the close of the Revolutionary War, claiming the same in fee. He also produced and read in evidence conveyances by way of lease and release executed by Roger Morris and wife in 1765, 1771, 1773, and other deeds and leases for parts of the lot No. 5, in which no mention was made of the marriage settlement and in which the property was described as held under the patent to Adolphe Philipse, and which Roger Morris and wife covenant "that they had good right and full power and lawful authority to release and convey the same in fee." The defendant also gave in evidence the exemplification of a patent to Beverly Robinson Roger Morris and Philip Philipse dated the 27 March, 1761, in which is recited the surrender of part of the great tract granted to Adolphe Philipse on 17 June, 1696, the descent of the whole of the said tract to the children of Frederic Philipse, no mention being made in the recitals of the marriage settlement, and by which patent two tracts of land, as a compensation for part of the land held under the original patent, which was

supposed to lie within the Connecticut line, was granted.

It was proved by the evidence of Mr. Watts that he had in his possession the marriage settlement deed which had been read in evidence at and immediately before the time of its proof before judge Hobart in 1787; that the witness wrote the body of the certificate of proof endorsed on the back; that the whole of the said certificate was written by the witness, except the name of judge Hobart, written at the bottom, which was written by the said judge; that he believes he wrote the certificate in the presence of the judge at the time the proof was made, which was at the house of said judge in the City of New York; Governor Livingston

was then staying at judge Hobart's house on a visit. On being shown the said original certificate, the witness said that a blank was originally left in the body of the said certificate for the name of the judge or officer before whom the said proof was to be made, and from that circumstance he had no doubt that the said certificate was written before he knew what officer would take the said proof, and not in the presence of the judge; that the witness received the said deed early in the said year 1787, in an enclosure from the said Roger Morris, who was then in London, England.

The plaintiff then gave in evidence, the defendant's excepting thereto, the Act of the Legislature of the State of New York passed April 16, 1827, entitled "An act to extinguish the claim of John Jacob Astor and others, and to quiet the possession of certain lands in the counties of Putnam and Dutchess;" the act passed April 19, 1828, entitled

"An act to revive and amend an act entitled 'An act to extinguish the claim of John Jacob Astor and others, and to quiet the possession of certain lands in the counties of Putnam and Dutchess.'"

Evidence was also given, the defendant's counsel excepting thereto, to show that this suit was defended for the State of New York by the attorney general of the state.

The counsel for the defendant then gave in evidence an exemplification of the proceedings of the Council of Safety of New York on 16 July, 1776, in which it was resolved unanimously that all persons abiding within the State of New York and deriving protection from the laws of the same owe allegiance to the said laws and are members of the state, and that all persons passing through, visiting, or making a temporary stay in the said state, being entitled to the protection of the laws during the time of such passage, visitation, or temporary stay, owe, during the same time, allegiance thereto; that all persons, members of or owing allegiance to this state as before described who shall levy war against the said state within the same or be adherent to the King of Great Britain or others the enemies of said state, and being thereof convicted, shall suffer the pains and penalties of death.

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The counsel for the defendant also read in evidence an act of the Legislature of the State of New York entitled

"An act for the forfeiture and sale of the estates of persons who have adhered to the enemies of this state, and for declaring the sovereignty of the people of this state in respect to all property within the same,"

passed 22 October, 1779, it being admitted by the counsel for both parties that Roger Morris, Mary Morris, the wife of Roger Morris, and Beverly Robinson mentioned in the first section of the act, are and were the same persons by those names thereinbefore mentioned, Beverly Robinson being the person by that name who was one of the parties to the marriage settlement deed.

Also an act entitled "An act for the speedy sale of the confiscated and forfeited estates within this state, and for other purposes therein mentioned," passed 12 May, 1784.

Also

"An act further to amend an act entitled 'An act for the speedy sale of the confiscated and forfeited estates within this state, and for other purposes therein

mentioned,'"

passed 1 May, 1786.

Also "An act limiting the period of bringing claims and prosecutions against forfeited estates," passed 28 March, 1797.

Also "An act for the limitation of criminal prosecutions and of actions and suits at law," passed 26 February, 1788, and "An act for the limitation of criminal prosecutions, and of actions at law," passed 8 April, 1801.

The counsel for the plaintiff then made and submitted to the court in writing the following points upon which they relied:

1. Mary Philipse, in January 1758, was seized in fee simple.

2. By the deed of settlement, a contingent remainder was limited to the children of that marriage which vested as soon as they were born, and no act of Morris or his wife, done after the execution of that deed, can impair the estate of the children.

3. The recital of the lease in the release is an estoppel against the defendant as to the fact so recited on the ground of privity of estate.

4. If the recital be not a technical estoppel, then it is an admission of a fact in solemn form by the parties to that deed, and is evidence of the fact recited from which the jury is bound to believe the fact unless it be disproved.

5. The attainder and sale under it operated as a valid conveyance of all the estate of the attainted persons at the date of the attainder, and no more. The purchasers under this state acquired a title in these lands for the lives of Morris and his wife and of the survivor of them, and in judgment of law must be considered as standing in the same relation to the children of that marriage as the original tenants for life whose estates were confiscated.

6. As the purchasers under the state were tenants for life, and the children of Morris and his wife, or their assignees, are seized in remainder of the fee, it results from that relation that the possession of the purchasers could not be adverse to the title of the remaindermen. The persons entitled to the remainder have five years from the death of Mrs. Morris to commence their suits for the land, and the sale by the remaindermen to Mr. Astor during the existence of the life estate in accordance with the rules of the common law and in violation of no statute.

7. The principles of natural law, as well as the Treaties of 3 September 1783, and 19 November, 1794, between the United States and Great Britain confirm and protect the estate so required by Mr. Astor.

And the counsel for the defendant submitted in writing to the court the following points on which they relied:

1. That the plaintiff cannot recover in this action unless a lease preceded or accompanied the release which has been read in the case.

2. That the plaintiff, not having offered any evidence of the actual execution or contents of any particular paper as such lease, cannot recover on the ground that a lease was executed and is lost.

3. That the testimony of Egbert Benson, Robert Troup, and the other witnesses as to the custom or practice of conveying by lease and release, the professional character of William Livingston, and his connection with the Philipse family, although it might under certain circumstances be evidence to lay the foundation for a general presumption, according to the rules of law respecting presumptions of deeds and grants, that a proper lease or other writing necessary to support the conveyance had been executed, is not competent to prove either the actual execution, existence in fact, or contents of the alleged lost lease.

4. That no legal presumption of a deed or lease such as is necessary to enable the plaintiff to support this action can fairly arise in this case, because the facts and

circumstances of the case are not such as could not, according to the ordinary course of affairs, occur without supposing such a deed or lease to have existed, but are perfectly consistent with the nonexistence of such lease.

5. That no possession having been proved in this case more consistent with the title of the plaintiff than with that of the defendant, any deed or lease necessary to support the plaintiff's action must be proved, and cannot be presumed.

6. That the recitals in the deed of release do not bind the defendant by way of estoppel, because he is a stranger to the deed and claims nothing under it.

7. That inasmuch as the defendant is not only a stranger to the deed of release and claims nothing under it, but as also it appears that the defendant's immediate grantor entered into possession of the premises as early as the year 1783 under a claim of title adverse to that supposed to be created by the said deed or release, and he and the defendant after and under him have continued so in possession under such adverse claim of title to the present time, the recitals in said deed of release are not evidence against the defendant.

8. Supposing the lease and release to have been duly executed, then the remainder, limited to the children of Roger Morris and Mary his wife, was a contingent, and not a vested,

remainder, at the time of the attainder and banishment of Roger Morris and Mary his wife, in 1779.

9. By the attainder and banishment of Roger Morris and Mary his wife in 1779, they became civilly dead, and their estate in the lands determined before the time when the contingent remainder to the children could vest, and thus the contingent remainder to the children was destroyed for the want of a particular estate to support it.

10. By the attainder and banishment of Beverly Robinson the surviving trustee in 1779 and the forfeiture of all his estate to the people of the State of New York, all

seizin, possibility of entry, or *scintilla juris* in Beverly Robinson to serve the contingent use when they arose was divested, and inasmuch as the estate cannot be seized to uses, there was no seizin out of which the uses in remainder could be served when the contingency upon which they were to arise or vest happened, and the state took the estate discharged of all the subsequent limitations in remainder.

11. In consequence of the attainder and banishment of Beverly Robinson, the surviving trustee, and Roger Morris and Mary, his wife, in 1779, and the forfeiture of all their, and each of their estate in the land to the people of the State of New York, the children of Roger Morris and Mary his wife never had any legal seizin in the land.

12. In consequence of the act of attainder and the conveyance made by the people of the State of New York to Timothy Carver with warranty, the estate of the children of Roger Morris and Mary his wife in the lands in question in this suit was defeated and destroyed.

13. Roger Morris and Mary his wife, under the marriage settlement deed, had an interest in the land, and might convey in fee to the amount of 3,000 in value. They did convey to the amount of 1,195 in value, and the residue of that interest was forfeited to, and vested in the people of New York, and the power was well executed by the conveyance of the commissioners of forfeitures to Timothy Carver, the defendant's grantor.

14. The whole title, both in law and equity, which may

or can be vested in the children and heirs of Roger Morris and Mary his wife, of, in, and to the lands and premises in question, has not been, as between the grantors and grantee, legally transferred to the said John Jacob Astor, his heirs and assigns.

15. A proper deed of conveyance in fee simple from the said John Jacob Astor and all persons claiming under him to the people of the State of New York, would not be valid and effectual to release, transfer, and extinguish all right, title and interest which now is or may have been vested in the children and heirs of Roger Morris and Mary his wife.

16. The plaintiff's action is barred under the act limiting the period of bringing claims and prosecutions against forfeited estates.

17. The plaintiff's action is barred under the general limitation act of 1788, also under the general limitation act of 1801.

Upon which the court expressed the following opinion and instructions, to be given to the jury on the defendant's points under the modifications stated in the same.

1. The court gave the instruction as prayed.

2. It having been satisfactorily proved to the court that the lease was lost, its execution and contents may be proved by secondary evidence.

3. That the testimony of Egbert Benson, Robert Troup, and other witnesses as to the custom and practice of conveying by lease or release, the professional character of William Livingston, and his connection with the Philipse family, coupled with the recital in the release, were admissible in this case to go to the jury for it to determine whether a proper lease, necessary to support the conveyance of release so as to pass the legal estate, had been executed.

4. That the jury might in this case presume, if the evidence satisfied it of the fact, that such lease was duly executed, if in its opinion the possession was held by Roger Morris and his wife under this marriage settlement deed embracing both the lease and release, and that it was for it to decide from the evidence whether the possession

was held under the marriage settlement or under the title of Mary Philipse anterior to the marriage settlement.

5. The instruction on this point is embraced in the answer to the fourth.

6. That the recital in the release does not bind the defendant by way of estoppel, but is admissible evidence to the jury, connected with the other circumstances, for it to determine whether a proper lease was made and executed.

7. The instruction on this point is included in the answer to the sixth.

8. The remainder limited to the children of Roger Morris and Mary his wife was a vested remainder at the time of the attainder and banishment of Roger Morris and Mary his wife in the year 1779, and did not thereafter require any particular estate to support it, but if a particular estate was necessary, there was one sufficient in this case for that purpose.

9 and 10. The answer to these points is included in the answer to the eighth.

11. The attainder and banishment of Beverly Robinson Roger Morris and Mary his wife in the year 1779, and the forfeiture of all their estate in the land to the people of the State of New York, and the conveyance to Timothy Carver of the lands in question, did not take away the right which the children of Roger and Mary Morris had under the marriage settlement deed.

12. The answer to this point is included in the answer to the eleventh.

13. Admitting that the power reserved to Morris and his wife to sell a part of the lands included in the marriage settlement deed became forfeited to the state, so far as it had not been executed, the sale to Timothy Carver could not, under the evidence in this case, be considered an execution of that power.

14. The whole title, both in law and equity, which may or can have vested in the children and heirs of Roger Morris and Mary his wife, of, in, or to the lands and premises in question has been, as between the grantors and grantee,

legally transferred to John Jacob Astor, his heirs and assigns, according to the true intent and meaning of the acts of the Legislature of the State of New York, which have been produced and read upon the trial.

15. A proper deed of conveyance in fee simple from John Jacob Astor, and all persons claiming under him, to the people of the State of New York would be valid and effectual to release, transfer, and extinguish all right, title, and interest which now is or may have been vested in the children and heirs of said Roger Morris and Mary his wife according to the true intent and meaning of the acts of the legislature referred to in the next preceding instruction.

16 and 17. The plaintiff's action is not barred by any statute of limitations in this state.

The court then charged the jury.

After stating the plaintiff's title under the patent to Adolphe Philipse in 1697, and that it was not denied by the defendant, but that Mary Philipse in 1754 became seized in severalty in fee simple of the premises in question, the court proceeded to say:

"At this point the dispute commences. On the part of the plaintiff it is contended that the marriage settlement deed which has been produced and submitted to you, bearing date in the year 1758, was duly executed and delivered on or about the time it bears date, the legal operation of which was to vest in Roger Morris and his wife Mary a life estate with a contingent remainder to their children which became vested in them on their birth, and that their right and title has been duly vested in Mr. Astor by the deed bearing date in the year 1809. On the part of the defendant it is contended that Mary Philipse never parted with her title in the premises by the marriage settlement deed set up on the other side, or that if she did, it was revested in her or her husband, and continued in them or one of them until they were attainted in the year 1779 by an act of the legislature of this state, and that the title to the land in question thereby became vested in the people of this state,

from whom the defendant derives title. Unless, therefore, the plaintiff can establish this marriage settlement deed so as to vest a legal

estate in the children of Roger Morris and Mary his wife, he cannot recover in this action."

"It will be proper for you, in examining and weighing the facts and circumstances of this case, to bear in mind that the children of Morris and wife could not assert in a court of law their right in this land until the death of Mrs. Morris in the year 1825, and since 1825 there has been no want of diligence in prosecuting and asserting the claim."

"In the year 1809, Mr. Astor purchased and acquired all the interest of the children of Morris and wife, and you are to consider him as now standing in their place."

"The first question then is was the marriage settlement duly executed? In the first place, the plaintiff has produced the ordinary and usual evidence of the execution of the deed, has shown that Governor Livingston was the subscribing witness, and that in 1787 he went before Judge Hobart and made the usual and ordinary proof of the execution of the deed -- such as was sufficient to entitle the deed to be recorded; the handwriting of the witnesses who are dead has also been proved. Upon this proof the *prima facie* presumption of law is that the deed was executed in all due form to give it force and validity, and in the absence of all other evidence, the jury would be justified if not conclusively bound to say that everything was properly done, including a delivery. But whether delivered or not is a question of fact for the jury."

"Delivery is absolutely essential; a deed signed but not delivered will not operate to convey land. But no particular form was necessary; if the grantee comes into the possession of the deed in any way which may be presumed to be with the assent of the grantor, that is enough, and is a good delivery in law, and if found in the hands of the grantee years afterwards, a delivery may fairly be presumed, and it will operate from and relate back to the time of its date in the absence of all proof

to the contrary. If a deed be delivered to an agent or thrown on a table with the intent that the grantee should have it, that is sufficient, although no words are used. Such proof as has been given in this case would be sufficient for a jury to presume a delivery,

even in the case of a modern deed, and is much stronger in relation to one of ancient date. In this case, what else could be proved? Would it be reasonable to require anything beyond what the plaintiff has proved? The witnesses are dead; their handwriting has been proved, and a proper foundation is thus laid for presuming that everything was done to give effect and validity to the deed."

"Such being the case, the burden of proof is thrown on the other side to rebut the presumption of a delivery warranted from these circumstances. Much stress has been laid upon the fact that the certificate of proof by Governor Livingston not only states that the witness saw the parties sign and seal, but that he saw them deliver the deed. In stating a delivery, the certificate is a little out of the ordinary form, and it is not important, and adds little or nothing to the evidence of a due and full execution of the deed, that the word 'deliver' was inserted. This insulated fact is not of much importance, for without that word, the legal effect of the proof would be the same; proof of the due execution, for the purposes expressed in the deed, includes a delivery."

"What then is the evidence to bring the fact of delivery into doubt? I separate now between the release and the lease; these are two distinct questions, and I shall consider the question relative to the lease hereafter. The argument of the defendant is that the deed was not delivered, and did not go into effect. Then what is the reasonable presumption to be drawn from the facts he has proved?, keeping in mind that this is evidence, by the defendant to disprove the presumption of law from the facts proved, that the deed was duly delivered. It has been said on the part of the defendant that the deed was probably kept for some time, and that the design to have a marriage settlement was finally abandoned. If you believe from the proof made by Governor Livingston that the deed went into the hands of the

parties, then there was a good delivery, because a deed cannot be delivered to the party as an escrow. Then is there any evidence to call the delivery into question? Where is the evidence to induce the belief that the deed was executed

with any understanding that it was not to have immediate effect, or that it was delivered to a third person as an escrow, or that the parties did not intend it as an absolute delivery? You have a right to say so, if there is evidence to support it; but if there is nothing to induce such a belief, then you are to say that it was duly delivered."

"It has been said that this was a dormant deed, never intended by the parties to operate; that it had slept until after the attainder and until the year 1787. There is weight in this, or rather there would be weight in it if the parties in interest had slept on their rights. But who has slept? Morris and his wife, Beverly Robinson and Joanna Philipse, the trustees: they are the persons that have slept, and not the children. This does not justify so strong an inference against the children as if they had slept upon their right. Is it fair in such a case to draw any inference against the children?"

"It has been said that there were three copies of this instrument; it is somewhat uncertain how many copies there were, or where they went. But suppose there were three copies, where would they probably go? Undoubtedly to the parties in interest. Mary Philipse would have one, and Roger Morris another, and the trustees the third. Mary Philipse, in a certain event contemplated in the marriage settlement, would again become seized in fee. She therefore had an interest in having one copy, for although she had parted with the fee, she took back a life estate with the possibility of an ultimate fee in the land revesting in her. Roger Morris also had an interest under the deed, and it is therefore reasonable to presume that he had one copy of the deed. The third copy would have gone to the trustees, Beverly Robinson and Joanna Philipse. But where did this one come from? All you have on this subject is that Mr. Watts received it from Morris in 1787, to have it acknowledged. This one, for the purpose of passing the title, is as good

as though all three were produced."

"It has also been urged that this deed was not recorded until 1787. Is there anything in that fact that should operate against the children? They were minors for the greater

part of the time down to the year 1787, when it was recorded."

"It has also been urged as a controlling fact that Morris was here at the close of the war, and did not have the deed recorded before going to England. It appears from the testimony of Colonel Barclay that Morris and his family left New York for England before the evacuation of the city by the British army, which was on 25 November, 1783. It is well known as a matter of history that the British were in possession of the City of New York through all the war. Is there anything then in the fact that it was not recorded from which an inference can be drawn against the deed? Where were the officers before whom Morris could at this time have had the deed proved? No law has been shown giving any such power, nor do I know of any such law. Then is there any just ground for a charge of negligence even against Morris himself? After 1783, there were officers here before whom the deed might have been acknowledged or proved."

"Is there anything in omitting to have it recorded after that time? There was only three or four years' delay, and are there not circumstances reasonably to account for that and show why it was recorded in 1787? In February preceding the time of proof and recording, the children made an application to the legislature, asserting and setting forth their claim. They were told by the report of the committee, which was adopted by the house, if you have a right, as you say you have, go to the courts of law, where you will have redress."

"This was a very proper answer. The report did not, however, as has been urged, contain any admission of their title; nor did the committee give any opinion upon the validity of the claim, and if they had, we cannot regard it. But all they or the house said was that if what you allege be true, you have a remedy in the courts of

law. This was calculated to awaken their attention and to induce them to prove and record their deed as a precautionary measure. It has been said that this was no more than the ordinary transaction of proving a deed, and that in the case of an old

deed, the witness finding his name to the deed, swears from that circumstance, rather than from any particular recollection, that he saw it executed. But in this case was there not something special and particular preceding the proof of this deed; something calculated to awaken attention, and ought it to be considered no more than the ordinary transaction of proving an old deed. Governor Livingston, the witness who proved the deed, as has been proved to you, was a man of high character, an eminent lawyer and a distinguished whig. It is fair to presume also that he knew what had been done just before in the legislature. Is it not reasonable then to believe that his attention was particularly called to the transaction, and that he referred back to the time of the execution of the deed, and that he would not have proved it if he had not a recollection of what then took place?"

"It is reasonable to presume, his attention being awakened, that he refreshed his recollection of the original transaction. It was proved at Judge Hobart's house. Mr. Watts drew the certificate. But can you presume that the witness would swear, and the judge would certify, without having read it? It is reasonable to presume that Judge Hobart, as well as the witness, knew what had taken place in the legislature in this city a short time before. This certificate is a little out of the ordinary form; it states the execution to have been at or about the day of its date; they may have thought it necessary to show that the deed was not got up to overreach the attainder. Is there anything in the circumstances of this proof to induce the belief of unfairness?"

"It is also said that Morris and his wife have done acts inconsistent with the deed. In weighing the force and effect of these acts, you must bear in mind the time when the interest vested in the children under this deed, for after that interest vested, none but themselves could divest it. It is said there is doubt as to the time

when the marriage took place; but it was probably between 1758 and 1761, for in the latter year, Mary Morris executed a deed as the wife of Roger Morris. I am inclined to think the law is that after the marriage, the parties to the deed could not disannul the

deed. But certainly not after the birth and during the life of the children of that marriage."

"We now come to the acts that are said to be inconsistent with the deed. Those acts are of three distinct kinds or classes. 1. Those for settling the exterior lines of the patent. 2. The deeds to Hill and Merritt. And 3, the leases for the lives of other persons."

"In estimating the weight of the first class, it will be proper for you to bear in mind the situation of the patent to Adolphe Philipse. It was bounded north by the Kip (or Van Cortland & Co.) patent and the Beekman patent, and on the east by Connecticut. The first class of instruments produced by the defendant relate to the Connecticut line, the Beekman patent, and the Kip (or Van Cortland) patent. The first deed is that of January 18, 1758; this relates to the boundary of the Beekman patent. You will see from this deed and its recital what the parties intended. It recites an agreement in 1754 to settle the lines of the two patents."

"You are not necessarily to take this as having been executed after the marriage settlement deed; delivery is what gives validity to a deed. Certainly Mary Philipse was not married at the time this deed was made, for if she had been, she would have signed it as Mary Morris. If she was not married and had not executed the marriage settlement deed, she was seized in fee of the land, and had the absolute control over it."

"Again, it does not appear how much of the Philipse patent was conveyed by this deed, and it was made in pursuance of an agreement in 1754 to settle the boundary."

"The next is the patent to Philipse, Robinson, and Morris, growing out of the settlement of the Connecticut line. The government settled the line between New York and Connecticut, making it a straight ling instead of one parallel to the Hudson River, according to the patent, and this patent was given to Morris and others for the lands lying on the west side of that line. And the patent recites that Morris and his wife had released to the King the land taken from the Philipse patent by the new line. This was an act to settle boundaries. Again, it is to be observed that Robinson and

Morris were both married; and yet the patent was not given to their wives, but to the husbands."

"The interest Morris had in the land was a life estate under the settlement deed, the same as it would have been without it. Without that deed, he had a life estate as tenant by the curtesy."

"Morris, instead of taking this patent to his wife or children, or in trust for them, took it to himself. He might, however, be considered as taking the land in trust for his children. But this alleged inconsistency of Morris is just as great without as with the settlement deed."

"The next is the deed to Verplank, in relation to the Kip or Bumbout patent. It does not appear that this deed conveyed any of the Philipse patent. But suppose it did, it does not necessarily follow that it was intended to assert any right in hostility to the marriage settlement deed. Is it not a fair and reasonable presumption, these children being infants, that the parents meant this as a settlement of difficulties about boundary, for the benefit of the children, and not that they intended to act in hostility to the deed? It was the act of parents, and not of strangers. The intention with which all these acts were done is important, as they are introduced to show that Morris and his wife have acted inconsistently with their right under the marriage settlement deed."

"We are next to consider the deeds to Hill and Merritt. Are these hostile to the settlement deed? If there had been no power to sell any part of the land, they would have been strongly inconsistent with the settlement deed. But that deed contains a power expressly giving them the right to sell in fee to the value of 3,000. They have only sold to the amount of 1,195, and so are within the power. But it has been said that these deeds do not recite the power -- that was not necessary; the purchasers in these (Hill and Merritt) deeds would acquire as valid a title as if the power had been recited. These deeds are therefore not inconsistent with the settlement deed."

"The next thing to be considered is the three life leases. Were these such acts of hostility as to induce the belief that

the settlement deed was not delivered? It has been argued on the part of the plaintiff that the word 'dispose,' in the power, would authorize these leases as well as sales in fee. This I think is not the true construction of the power. Looking at the latter part of the power, it is evident that by the words 'sell' and 'dispose of,' they only contemplated sales, and not leasing for life or lives. And so, in strictness of law, they had no power to make these leases for lives. But if they had no such power, still the question returns how is that to affect the rights of the children, and did they intend it in hostility to those rights? It could not affect their interest in the land. The question is not what was the legal effect of these acts, but how did Morris intend them? Did he actually mean to act in hostility to the deed? That is the question. You are not to construe it an act of hostility unless it was so intended by Morris. It was a new country; clearing and improving the lands was for the benefit of the children, and if Morris so intended these leases, they are not hostile to the deed. These are all the circumstances relied upon as being inconsistent with the settlement deed, and they are questions for you. I do not wish to interfere with your duties. It is for you to say whether the deed was duly executed and delivered."

"The next question for your consideration is whether there was a lease as well as a release. In the judgment of the court, a lease was necessary to convey a legal estate to the children, and through them to Mr. Astor. Without a lease, this deed would only have operated as a bargain and sale, and the statute (for reasons that I need not stop to explain) would not have executed the ulterior uses. So a lease is indispensable to the plaintiff's title. Then the question is are you satisfied that a lease was executed? This perhaps is the stress of the case. On this subject, questions of law are intermingled with the facts. The plaintiff says that the recital in the release is conclusive evidence of the lease -- such evidence as cannot be disputed. If so, then it would operate as a technical estoppel, and Carver's mouth would be shut and he would not be permitted to dispute the existence

of the lease, whether there was one in point of fact or not. But it is not enough to make it an estoppel that the defendant claims under the same party; he must claim under or through the same deed or through the same title. Here neither the defendant nor the state claim through this deed; they claim in hostility to it; they say there never was such a deed; they claim the interest that was in Mary Philipse in 1754. This recital is not, therefore, to be considered a technical estoppel."

"The question, then, is whether the recital can operate in any other way. The court has before decided in your hearing that this recital is evidence for the jury, and it is for you to say what weight and importance it ought to have. The defendant has excepted to the decision of the court that this is evidence, and if the court should have mistaken the law, the defendant will have his redress. You are therefore to take this recital as evidence legally and properly admitted, and if legal evidence, it is evidence for some purpose. It would be absurd for the court, after deciding that it is legal evidence, to tell you not to consider it or that it is entitled to no weight or importance. You must therefore regard this recital as evidence."

"The recital being evidence, the question is for you to decide what is its weight and importance. In recent transactions, where the party can have other evidence of the fact, recitals are of little weight. But in ancient transactions they are of more weight

and consequence. There may be no witness to prove the fact. And the force and importance of a recital may be greater or smaller according to the facts and circumstances of each particular case. Here the lease is lost, and it cannot therefore be shown who were the witnesses to it nor with certainty what it contained. The witnesses to the release are dead, and the plaintiff could not therefore be called upon to produce them. In the proof of ancient transactions, the rules of evidence must be relaxed in some measure to meet the necessity of cases. Where witnesses cannot be had, we have to resort to other proof. These will have greater weight in some cases than in others.

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If the case is stripped of any fact or circumstance to induce a suspicion of fraud, then a recital will have greater weight."

"From the release it is reasonable to presume that the parties intended to convey a legal estate. This deed, if not drawn by Governor Livingston, was most likely drawn under his advice and direction, and is it not fair to presume that he drew the proper deeds to carry into effect the intentions of the parties? If he acted fairly, he would have done so, and is it not a fair presumption that he drew such an instrument as was customary at that day and deemed necessary to convey the legal estate?"

"It is proved that the lease and release was the ordinary mode of conveyance. Judge Benson says that was the uniform practice, and colonel Troup says the same. This is an additional circumstance to induce the belief that a lease was executed, and it is for you to determine whether the circumstances are sufficient to satisfy you that what was usual and in accordance with the ordinary course of business was done in this case."

"But it is objected that the lease is not produced. The plaintiff has, in the opinion of the court, accounted for this by proving it lost. It has been shown not to have been the general practice to record the leases with the releases; very few appear ever to have been so recorded in proportion to the releases, and those produced in

court on the part of the defendant have never been recorded. It has been said that the lease had performed its office the moment the release was executed, and was no longer of any moment. This is not correct, but if the parties were under that impression, it will in some measure account for their not keeping it with greater care."

"If you are satisfied from the evidence that there was a lease duly executed, then the plaintiff has a right to recover unless some act has since been done changing the rights of the parties."

"The defendant's counsel have urged that this is not a case for presumptions in favor of the existence of a lease; that

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presumptions can only be resorted to when the possession accords with the fact to be presumed. There may be some question on this point. I have examined all the cases cited, but I find none that come precisely to this case. So far as I understand the cases, presumptions cannot be resorted to in hostility to the possession. The mere fact of a naked possession proves but little. Courts therefore admit evidence of the declarations of parties in possession of land to show how they hold. In this case, the possession may be considered equivocal. Morris and wife would have been entitled to the possession whether there was or was not such a deed, and presuming a lease would not necessarily be presuming a fact in hostility to the possession. If you are therefore satisfied that Morris and wife were in possession, holding under the deed of marriage settlement, presumptions may be indulged in favor of the existence of the lease. But if you consider them holding the possession in hostility to the marriage settlement, it is not a case for presuming a lease."

"A lease and release are considered but one instrument, though in two parts. The absence of the lease is not the loss of an entire link in a chain of title, but it is a defect of a part of one instrument. Suppose a deed purporting to pass a fee, produced without a seal, and from the lapse of time or other cause, there is no

appearance of its ever having had a seal. Then the party must show that it had been sealed, for otherwise it would not pass the fee. By what kind of evidence could this fact be established? Would it not be proper to look at the conclusion and attestation of the deed -- 'Signed, sealed,' &c.;? Would it not also be proper evidence to show it was drawn by a man who knew that a seal was necessary to pass the estate, and other circumstantial evidence, and for the jury, from evidence of this description, to presume and find that the instrument was duly sealed, to supply the defect and infirmity of the deed?"

"If you are satisfied the lease as well as release was executed and delivered, a legal estate has been shown in the

heirs of Roger and Mary Morris, and the plaintiff will be entitled to recover unless that title has been revested in Roger and Mary Morris or one of them."

"It is said that the title has been revested in Mrs. Morris by some conveyance since the settlement deed. This you may presume if in your opinion the evidence will warrant such presumption. But no redelivery, canceling, or the like would have that effect; there must have been a reconveyance. This must also have been made before the marriage, or at the utmost length before the birth of a child; therefore you can only look to circumstances arising before the marriage or before the birth of a child unless you should be of opinion that the acts of Roger Morris and his wife which have been given in evidence, were in hostility to this marriage settlement deed. The children may have reconveyed since they came of age. But the circumstances do not weigh very strongly against them before 1825, when they were first in a condition to assert their rights. There cannot be any very strong grounds for supposing the children ever reconveyed. And if there is anything to satisfy you there was a reconveyance, you will say so, and it will defeat the plaintiff's right to recover. But in my judgment the result will depend principally upon the question whether a lease and release were duly executed and delivered so as to pass the legal estate."

"The deed of the state only passed such right to the defendant's father as the state had, and if the marriage settlement deed has been established, that was nothing more than the life estate of Morris and wife. It is not necessarily to be inferred from any of the acts read that the state intended to take any greater interest than such as the persons attainted had. They sold what the commissioners of forfeitures judged had been forfeited. They did not examine into the state of the title, but only exercised their judgment upon such information as they had. It was for that reason that the state conveyed with warranty. The state cannot be presumed to have intended to conclude the rights of third persons who were not attainted. If, therefore, you

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shall find that the marriage settlement deed, consisting of a lease and release, was duly executed and delivered on or about the time it purports to bear date, the children of Roger and Mary Morris acquired under it a contingent remainder which became vested on their birth, and the plaintiff will be entitled to recover unless that interest was destroyed or put an end to by some subsequent reconveyance, of which you will judge and determine."

Upon this charge, and on the opinion, the court left the case to the jury. A verdict and judgment were rendered for the plaintiff, and the defendant prosecuted this writ of error.

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MR. JUSTICE Story delivered the opinion of the Court.

This is a writ of error to the Circuit Court of the Southern District of New York in a case where the plaintiff in error was the original defendant. The action is ejectment, brought upon several demises, and among others, upon the demise of John Jacob Astor. The cause was tried upon the general issue, and a verdict rendered for the original plaintiff, upon which judgment was entered in his favor, and the present writ of error is brought to revise that judgment.

Both parties claim under Mary Philipse, who, it is admitted, was seized of the premises in fee in January, 1758. Some of the counts in the declaration are founded upon demises made by the children of Mary Philipse by her marriage with Roger Morris, and one of whom is upon the demise of John Jacob Astor, who claims as a grantee of the children.

Various exceptions were taken by the original defendant at the trial to the ruling of the court upon matters of evidence, as well as upon certain other points of law growing out of the titles set up by the parties. The charge of the court in summing up the case to the jury is also spread *in extenso* upon the record, and a general exception was taken to each and every part of the same on behalf of the original defendant. And upon all these exceptions the case is now before us.

We take this occasion to express our decided disapprobation of the practice (which seems of late to have gained ground) of bringing the charge of the court below at length before this Court for review. It is an unauthorized practice, and extremely inconvenient both to the inferior and to the appellate court. With the charge of the court to the jury upon mere matters of fact and with its commentaries upon the weight of evidence this Court has nothing to do. Observations of that nature are understood to be addressed to the jury merely for their consideration as the ultimate judges of matters of fact, and are entitled to no more weight or importance than the jury in the exercise of its own

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judgment chooses to give them. They neither are nor are they understood to be binding upon it as the true and conclusive exposition of the evidence. [Footnote 1] If, indeed, in the summing up, the court should mistake the law, that would justly furnish a ground for an exception. But the exception should be strictly confined to that misstatement, and by being made known at the moment, would often enable the court to correct an erroneous expression or to explain or qualify it in such a manner as to make it wholly unexceptionable or perfectly distinct. We trust, therefore, that this Court will hereafter be spared the necessity of examining the general bearing of such charges. It will in the present case be our duty hereafter to

consider whether the objections raised against the present charge can be supported in point of law.

The original plaintiff claimed title at the trial under a marriage settlement, purporting to be made and executed on 13 January, 1758, by an indenture of release, between Mary Philipse of the first part, Roger Morris of the second part, and Joanna Philipse and Beverly Robinson of the third part, whereby, in consideration of a marriage intended to be solemnized between Roger Morris and Mary Philipse, &c.;, she, Mary Philipse, granted, released, &c.;, unto Joanna Philipse and Beverly Robinson

"in their actual possession now being, by virtue of a bargain and sale to them thereof made for one whole year, by indenture bearing date the day next before the date of these presents, and by force of the statute for transferring uses into possession, and to their heirs, all those several lots or parcels of land,"

&c.;, upon certain trusts and uses in the same indenture mentioned. This indenture, signed and sealed by the parties, with the usual attestation of the subscribing witnesses (William Livingston and Sarah Williams), to the sealing and delivery thereof, with a certificate of the proof of the due execution thereof by William Livingston (one of the subscribing witnesses), before Judge Hobart, of the supreme court of New York, on 5 April, 1787, and

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a certificate of the recording thereof in the Secretary's Office of the State of New York, was offered in evidence at the trial by the plaintiff, and was objected to by the defendant upon the ground that the certificate of the execution was not legal and competent evidence and did not entitle the plaintiff to read the deed in evidence without proof of its execution. The judge who presided at the trial overruled the objection and admitted the deed in evidence. This constitutes the first exception of the defendant. A witness was then sworn who testified that the signatures of William Livingston and Sarah Williams to the deed were in their proper handwriting and that they were both dead. The deed was then read in

evidence. The certificate of the probate of the deed before Judge Hobart is in the usual form practiced in that state, excepting only that it states with somewhat more particularity than is usual that William Livingston, one of the subscribing witnesses, &c.;, being duly sworn, did testify and declare

"That he was present at or about the day of the date of the indenture and did see the within named Joanna Philipse, Beverly Robinson, Roger Morris, and Mary Philipse sign and seal the same indenture and deliver it as their and each of their voluntary acts and deeds,"

&c.;

We are of opinion that under these circumstances and according to the laws of New York, there was sufficient *prima facie* evidence of the due execution of the indenture (by which we mean not merely the signing and sealing, but the delivery also) to justify the court in admitting it to be read to the jury, and that in the absence of all controlling evidence, the jury would have been bound to find that it was duly executed. We understand such to be the uniform construction of the laws of New York in all cases where the execution of any deed has been so proved, and has been subsequently recorded. The oath of a subscribing witness before the proper magistrate and the subsequent registration are deemed sufficient *prima facie* to establish its delivery as a deed. The objection was not, indeed, seriously pressed at the argument.

The next exceptions of the defendant grew out of the

nonproduction of the lease recited in the deed of marriage settlement and of the insufficiency of the evidence to establish either its original existence or its subsequent loss. We do not think it necessary to go into a particular examination of the various exceptions on this head or of the actual posture under which they were presented to the court or of the manner in which they were ruled by the court. Whichever way many of the points may be decided, our opinion proceeds upon a ground which supersedes them and destroys all their influence upon the cause.

We are of opinion not only that the recital of the lease in the deed of marriage settlement was evidence between these parties of the original existence of the lease, but that it was conclusive evidence between these parties of this original existence, and superseded the necessity of introducing any other evidence to establish it.

The reasons upon which this opinion is founded will now be briefly expounded. To what extent and between what parties the recital of a lease in a deed of release (for we need not go into the consideration of recitals generally) is evidence is a matter not laid down with much accuracy or precision in some of the elementary treatises on the subject of evidence. It is laid down generally that a recital of one deed in another binds the parties and those who claim under them. Technically speaking, it operates as an estoppel, and binds parties and privies -- privies in blood, privies in estate, and privies in law. But it does not bind mere strangers or those who claim by title paramount the deed. It does not bind persons claiming by an adverse title or persons claiming from the parties by title anterior to the date of the reciting deed.

Such is the general rule. But there are cases in which such a recital may be used as evidence even against strangers. If, for instance, there be the recital of a lease in a deed of release and in a suit against a stranger the title under the release comes in question, there the recital of the lease in such release is not *per se* evidence of the existence of the lease. But if the existence and loss of the lease be established by other evidence, there the recital is admissible as secondary

proof in the absence of more perfect evidence to establish the contents of the lease, and if the transaction be an ancient one and the possession has been long held under such release and is not otherwise to be accounted for, there the recital will of itself under such circumstances materially fortify the presumption from lapse of time and length of possession of the original existence of the lease. Leases, like other deeds and grants, may be presumed from long possession which cannot otherwise be explained, and under such circumstances a recital of the fact of such

a lease in an old deed is certainly far stronger presumptive proof in favor of such possession under title than the naked presumption arising from a mere unexplained possession.

Such is the general result of the doctrine to be found in the best elementary writers on the subject of evidence. [Footnote 2] Peake on Evidence, p. 165, seems indeed to have entertained a different opinion and to have thought, even as between the parties, the recital was admissible, as secondary evidence only, upon proof that the lease was lost. But in this opinion he is not supported by any modern authority, and it is very questionable if he has not been misled by confounding the different operations of recitals as evidence between strangers and between parties. It may not, however, be unimportant to examine a few of the authorities in support of the doctrine on which we rely. The cases of *Marchioness of Anandale v. Harris,* 2 P.Wms. 432, and *Shelley v. Wright,* Willes 9, are sufficiently direct as to the operation of recitals by way of estoppel between the parties. In *Ford v. Gray,* 1 Salk. 285, one of the points ruled was

"that a recital of a lease in a deed of release is good evidence of such lease against the releasor and those who claim under him, but as to others it is not, without proving that there was such a deed, and it was lost and destroyed."

The same case is reported in 6 Mod. 44, where it is said that it was ruled, "that

the recital of a lease in a deed of release is good evidence against the releasor, and those that claim under him." It is then stated that

"A fine was produced, but no deed declaring the uses, but a deed was offered in evidence which did recite a deed of limitation of the uses, and the question was whether that [recital] was evidence, and the court said that the bare recital was not evidence, but that if it could be proved that such a deed had been, and lost, it would do if it were recited in another."

This was doubtless the same point asserted in the latter clause of the report in Salkeld, and, thus explained, it is perfectly consistent with the statement in Salkeld, and must be referred to a case where the recital was offered as evidence against a stranger. In any other point of view, it would be inconsistent with the preceding propositions, as well as with the cases in 2 P. Williams and Willes. In *Trevivan v. Lawrence,* 1 Salk. 276, the court held that the parties and all claiming under them were estopped from asserting that a judgment sued against the party as of trinity term was not of that term, but of another term, that very point having arisen and been decided against the party upon a *scire facias* on the judgment. But the court there held (what is very material to the present purpose) that

"If a man makes a lease by indenture of D in which he hath nothing, and afterwards purchases D in fee, and afterwards bargains and sells is to A and his heirs, A shall be bound by this estoppel, and that where an estoppel works on the interest of the lands, it runs with the land into whose hands soever the lands comes, and an ejectment is maintainable upon the mere estoppel."

This decision is important in several respects. In the first place, it shows that an estoppel may arise by implication from a grant, that the party hath an estate in the land, which he may convey, and he shall be estopped to deny it. [Footnote 3] In the next place it shows that such estoppel binds all persons claiming the same land not only under the same deed, but under any subsequent conveyance from the same party; that

is to say, it binds not merely privies in blood, but privies in estate, as subsequent grantees and alienees. In the next place it shows that an estoppel, which (as the phrase is) works on the interest of the land, runs with it into whose ever hands the land comes. Now this last consideration comes emphatically home to the present case. The recital of the lease in the present release, works on the interest in the land; the lease gave an interest in the land, and the admission of it in the release enabled the latter to operate in the manner which the parties intended. The estoppel, therefore, worked on the interest in the land, not by implication merely,

but directly by the admission of the parties. That admission was a muniment of the title, and as an estoppel traveled with the title into whose ever hands it might afterwards come. The same doctrine is recognized by Lord Chief Baron Comyn in his Digest Estoppel B. & E. 10. In the latter place (E. 10) he puts the case more strongly, for he asserts that the estoppel binds, even though all the facts are found in a special verdict. "But," says he (and he relies on his own authority),

"where an estoppel binds the estate, and converts it to an interest, the court will adjudge accordingly. As if A leaves lands to B fox six years, in which he has nothing, and then purchases a lease of the same land for twenty-one years, and afterwards leases to C for ten years, and all this is found by verdict, the court will adjudge the lease to B good, though it be so only by conclusion. A doctrine similar in principle was asserted in this Court in *Terrett v. Taylor,* 9 Cranch 52. The distinction then, which was urged at the bar, that an estoppel of this sort binds those claiming under the same deed, but not those claiming by a subsequent deed under the same party, is not well founded. All privies in estate by subsequent deed are bound in the same manner as privies in blood, and so indeed is the doctrine in Comyn's Digest Estoppel B. and in Coke Litt. 352, a."

We may now pass to a short review of some of the American cases on this subject. *Denn v. Cornell,* 3 Johns. 174, is strongly in point. There, Lieutenant Governor Colden, in 1775, made his will, and in it recited that he had

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conveyed to his son David his lands in the Township of Flushing, and he then devised his other estate to his sons and daughters, &c.; Afterwards David's estate was confiscated under the act of attainder, and the defendant in ejectment claimed under that confiscation, and deduced his title from the state. No deed of the Flushing estate (the land in controversy) was proved from the father, and the heir at law sought to recover on that ground. But the court held that the recital in the will that the testator had conveyed the estate to David was an estoppel of the heir to deny that fact, and bound the estate. In this case, the estoppel was set up by the tenant claiming under the state as an estoppel running with the land. If the

state or its grantee might set up the estoppel in favor of their title, then, as estoppels are reciprocal and bind both parties, it might have been set up against the state or its grantee. It has been said at the bar that the state is not bound by estoppel by any recital in a deed. That may be so where the recital is in its own grants or patents, for they are deemed to be made upon suggestion of the grantee. [Footnote 4] But where the state claims title under the deed or other solemn acts of third persons, it takes it *cum onere* and subject to all the estoppels running with the title and estate in the same way as other privies in estate.

In *Penrose v. Griffith,* 7 Binn. 231, it was held that recitals in a patent of the commonwealth were evidence against it, but not against persons claiming by title paramount from the commonwealth. The court there said that the rule of law is that a deed containing a recital of another deed is evidence of the recited deed against the grantor and all persons claiming by title derived from him subsequently. The reason of the rule is that the recital amounts to the confession of the party, and that confession is evidence against himself and those who stand in his place. But such confession can be no evidence against strangers. The same doctrine was acted upon and confirmed by the same court in *Garwood v. Dennis,* 4 Binn. 314. In

that case the court further held that a recital in another deed was evidence against strangers, where the deed was ancient, and the possession was consistent with the deed. That case also had the peculiarity belonging to the present, that the possession was of a middle nature -- that is, it might not have been held solely in consequence of the deed, for the party had another title; but there never was any possession against it. There was a double title, and the question was to which the possession might be attributable. The court thought that a suitable foundation of the original existence and loss of the recited deed being laid in the evidence, the recital in the deed was good corroborative evidence even against strangers. And other authorities certainly warrant this decision. [Footnote 5]

We think, then, that upon authority, the recital of the lease in the deed of release in the present case was conclusive evidence upon all persons claiming under the parties in privity of estate, as the present defendant in ejectment did claim, and independently of authority, we should have arrived at the same result upon principle, for the recital constitutes a part of the title, and establishes a possession under the lease necessary to give the release its intended operation. It works upon the interest in the land and creates an estoppel which runs with the land against all persons in privity under the releasors. It is as much a muniment of the title as any covenant therein running with the land.

This view of the matter dispenses with the necessity of examining all the other exceptions as to the nature and sufficiency of the proof of the original existence and loss of the lease, and of the secondary evidence to supply its place.

The next question is, supposing the marriage settlement duly executed, what estate passed by it to Morris and his wife, and their children. The uses declared in the deed are in

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the following terms:

"to and for the use and behoof of them, the said Joanna Philipse and Beverly Robinson (the releasees) and their heirs until the solemnization of the said intended marriage, and from and immediately after the solemnization of the said intended marriage, then to the use and behoof of the said Mary Philipse and Roger Morris and the survivor of them for and during the term of their natural lives, without impeachment of waste, and from and after the determination of that estate, then to the use and behoof of such child or children as shall or may be procreated between them, and to his, her, or their heirs and assigns forever. But in case the said Roger Morris and Mary Philipse shall have no child or children begotten between them or that such child or children shall happen to die during the lifetime of the said Roger and Mary, and the said Mary should survive the said Roger without issue, then to the use and behoof of her the said Mary Philipse, and her

heirs and assigns forever. And in case the said Roger should survive the said Mary Philipse without any issue by her, or that such issue is then dead without leaving issue, then, after the decease of the said Roger Morris, to the only use and behoof of such person or persons and in such manner and form as the said Mary Philipse shall at any time during the said intended marriage devise the same by her last will and testament,"

&c.; There are other clauses not material to be mentioned.

The marriage took effect; children were born, and indeed all the children were born before the attainder in 1779. Mary Morris survived her husband and died in 1825, leaving her children, the lessors of the plaintiff, surviving her. The conveyance taking effect by the statute of uses, upon a deed operating by way of transmutation of possession, no difficulty arises in giving full effect, by way of springing or shifting or executory uses, to all the limitations in whatever manner they may be construed. The counsel for the original defendant contend that the parents take a life estate and that there is a remainder upon a contingency, with a double aspect. That the remainder to the children is upon the contingency of their surviving their parents, and in case of their

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nonsurvivorship, there is an alternative remainder to the mother, which would take effect in lieu of the other. That consequently the remainder to the children was a contingent remainder during the life of their parents, and as such it was destroyed by the proceedings and sale under the act of attainder and banishment of 1779. The circuit court was of a different opinion, and held that the remainder to the children was contingent until the birth of a child, and then vested in such child and opened to let in after born children, and that there being a vested remainder in the children at the time of the act of 1779, it stands unaffected by that act.

We are all of opinion that the opinion of the circuit court upon the construction of the settlement deed was correct. It is the natural interpretation of the words of the limitations in the order in which they stand in the declaration of the uses. The

estate is declared to be to the parents during their natural lives, and then to the use and behoof of such child or children as may be procreated between them, and to his, her, and their heirs and assigns forever. If we stop here, there cannot be a possible doubt of the meaning of the provision. There is a clear remainder in fee to the children, which ceased to be contingent upon the birth of the first, and opened to let in the after born children. [Footnote 6] It is perfectly consistent with this limitation that the estate in fee might be defeasible and determinable upon a subsequent contingency, and upon the happening of such contingency might pass by way of shifting executory use (as it might in case of a devise by way of executory devise) to other persons in fee, thus mounting a fee upon a fee. The existence then of such executory limitation over by way of use would not change the nature of the preceding limitation, and make it contingent, any more than it would in the case of an executory devise. The contingency would attach not to the preceding limitation, but to the executory use over.

Let us now consider what is the effect of the succeeding

clause in the settlement deed, and see if it be capable, consistently with the apparent intention of the parties, of operating as an alternative remainder under the double aspect of the contingency, as contended for by the original defendant. The clause is

"but in case the said Roger Morris and Mary shall have no such child or children begotten between them or that such child or children shall happen to die during the lifetime of the said Roger and Mary and the said Mary should survive the said Roger without issue, then"

&c.; Now it is important to observe that this clause does not attach any contingency to the preceding limitation to the children, but merely states the contingency upon which the estate over is to depend. It does not state that the children shall not take unless they survive the parents, but that the mother shall take in case she survives her husband without issue. She then, and not the

children, is to take in case of the contingency of her survivorship. It is applied to her and not to them. Besides, upon the construction contended for at the bar, if all the children should die during the lifetime of the parents, leaving any issue, such issue could not take, and yet a primary intention was to provide for the issue of the marriage. Nor in such a case could the mother take the estate over, for that, by the terms of the settlement, could take effect only in case she survived her husband without issue. The subsequent clause demonstrates this still more fully, for her power to dispose of the estate by will in case her husband survives her is confined to such survivorship if "such issue is then dead without leaving issue."

Another difficulty in the construction contended for is that the children must survive both the parents, and that if they should survive the mother and not the father, in that event they could not take, yet the settlement plainly looks to the event of the death of the mother without issue, as that alone in which the estate over is to have effect. It is also the manifest intention of the settlement that if there is any issue, or the issue of any issue, such issue shall take the estate, which can only be by construing the prior limitation in the manner in which it is construed by this Court. The general rule of law, founded on public policy, is that limitations of this

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nature shall be construed to be vested when and as soon as they may. The present limitation, in its terms, purports to be contingent only until the birth of a child, and may then vest. So that whether we consult the language of the settlement, the order of its provisions, the apparent intention of the parties, or the general rule of law, they all lead to the same results -- that the estate to the children was contingent only until their birth, and that when the act of 1779 passed, they being all then born, it was a vested remainder in them and their heirs, and not liable to be defeated by any transfer or destruction of the life estate.

This view of the settlement deed renders it wholly unnecessary to enter upon any minute consideration of the nature and operation of the attained act of 1779, since it is clear that that act, whether it worked a transfer or destruction of the life estate of the parents, and, in our opinion the former was its true operation, it did not

displace the vested remainder of the children, but left it to take effect upon the regular determination of the life estate.

In respect to another point raised at the argument, that the power reserved to Roger Morris and his wife under the marriage settlement to dispose of the land to the amount of 3,000, so far as it remained unexecuted by them, was by the attainder act of 1779 transferred to the state, and might be executed by the state, we are of opinion that it is not well founded. In the first place, we consider this to be a power personal in the parents, and to be exercised in their discretion, and not in its own nature transferable. Even under the statutes of treason in England, powers and conditions personal to the parties did not by an attainder pass to the Crown. 1 Hale's Pl.Cranch 240, 242, 244-246; *Jackson v. Catlin,* 2 Johns. 248; Sugden on Powers 174, 176. And it has been settled in New York that the offense stated in the act was not, strictly speaking, treason, but *sui generis* as the terms of the act stated it. [Footnote 7] In the next place, the act purports to vest in the state, by forfeiture, the "estates" only of the offenders, and being a

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penal act, it is to be construed strictly. A power to dispose of land in the seizin of a third person is in no just sense an estate in the land itself. In the next place, the deed of the commissioners authorized by the act purports generally to convey all the estate, right, title, and interest of the offenders in the property conveyed, and does not purport to by any execution of a limited nature and object. In every view, the doctrine contended for is untenable.

Passing over for the present some minor exceptions, we may now advance to the consideration of the objections urged against the charge of the court, and these objections, so far as they have not been already disposed of by the questions growing out of the proofs applicable to the lease, are to the direction of the court upon the point whether there was or was not a due delivery of the marriage settlement deed. If that deed was duly delivered, then no acts done after the marriage by the parents, however inconsistent with that deed, could affect the legal validity of the rights of the children once acquired and vested in them under

it. But the point pressed at the trial was whether it was ever executed and delivered at all, so as to have become an operative conveyance, or whether there was a mere nominal execution by the parties, and whether it was laid aside and abandoned as a conveyance before the marriage, and never became complete by delivery. There was at the trial what the law deems sufficient *prima facie* evidence of the delivery of the deed. But certain omissions as well as certain acts of the parents were relied on to rebut this evidence and to establish the conclusion that there had been, in point of fact, no such delivery. With the value of these acts and circumstances as matters of presumption for the consideration of the jury by way of rebutter of the *prima facie* evidence this Court has nothing to do, and does not intend to express any opinion thereon. But so far as they bore upon the fact of delivery, they applied with the same force in relation to the children as they did in relation to the parents -- that is, so far as they were presumptive of the nondelivery of the deed, they furnished the same presumption against the children that they would against the parents. They were open to explanation and observation, and had just as much weight in

the one case as in the other. They were not acts or omissions which bound the children, supposing them to have any vested interest, but circumstances of presumption to be weighed, as far as they went, to establish that no interest ever vested in them by reason of the nondelivery of the deed of settlement. Whatever might be the inconsistency of these acts with the provisions of that deed, that inconsistency was not otherwise important than as it might furnish a presumption against the existence of the deed as an operative conveyance.

It is reference to these considerations that the argument at the bar has insisted upon objections to the charge of the judge at the trial, and in examining the charge on this head, difficulties have occurred to the Court itself.

The circumstances principally relied upon were the dormancy of the settlement deed from 1758 to 1779, the omission to record it until 1787, and the supposed inconsistency of certain deeds executed by the parents between 1758 and 1773

with the title under that settlement.

In respect to the dormancy of the deed, the charge is as follows:

"It has been said that this is a dormant deed, never intended by the parties to operate; that it had slept until after the attainder and until the year 1787. There is weight in this, or rather there would be weight in it if the parties in interest had slept on their rights. But who has slept? Morris and wife, Beverly Robinson and Joanna Philipse, the trustees. They are the persons that have slept, and not the children. This does not justify so strong an inference against the children as if they had slept upon their rights. Is it fair in such a case to draw any inference against the children?"

To two of the judges this appears to amount to a direction that in point of law, the dormancy of the deed during this period, not having been the act of the children, does not furnish the same presumption of the nondelivery against them as it would against the parents, and that, to give the presumption from this circumstance full effect, it ought to appear that the children had slept on their rights -- that is, had acquiesced in such dormancy of the title. To those

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judges this direction seems erroneous because the presumption is the same whether the children acquiesced or not.

In respect of the nonrecording of the deed, the charge proceeds to state

"It has also been urged that this deed was not recorded until 1787. Is there anything in this fact that should operate against the children? They were minors for the greater part of the time down to the year 1787, when it was recorded,"

&c.; It seems to the same judges that the same distinction, as to the effect of the presumption in the case of the parents and that of the children, pervades this, as it does the former statement.

As to the inconsistency relied on, the introductory part of the charge is as follows:

"It is also said that Morris and his wife have done acts inconsistent with the deed. In weighing the force and effect of these acts, you must bear in mind the time when the interest vested in the children under this deed, for after that interest vested, none but themselves could divest it,"

&c.; It is certainly true that after the interest was once vested in the children, no act, however inconsistent with the deed, done by the parents could affect that interest. But the point of view under which the argument was addressed to the court was that such inconsistency furnished ground for a presumption of a nondelivery of the deed, and in this point of view it seems to the same judges that this part of the charge relies too much upon a distinction between the parents and children as to the effect of the presumption. In another part of the charge, the judge very properly puts all these acts of supposed inconsistency upon the true ground: what was the interest of the parties in these acts, and whether they were done in hostility to the deed, supposing it inoperative, or as acts of parents acting beyond the deed for what they might deem beneficial to their children, and for the interest of all concerned in the estate.

To the other judges, however, these objections do not appear to be well founded when taken in connection with the general scope and object of the remarks of the judge in his charge upon this branch of the case. The purpose for which these omissions and acts of alleged inconsistency in Morris were offered had been explicitly stated. The jury had been

told that they were relied upon to rebut the evidence of delivery of the deed which had been offered on the part of the plaintiff below. Before entering upon any comments on this evidence, and to prepare the minds of the jury for the due application of the remarks, the judge observed

"What then is the evidence to bring the fact of delivery into doubt? What is the reasonable presumption to be drawn from the facts proved?, keeping in mind that this is evidence on the part of the defendant to disprove the presumption of law,

from the facts proved, that the deed was duly delivered. The jury was therefore fully apprised of the bearing of these circumstances and the purpose for which they were offered. And it could not but have understood that it was submitted to it to judge of the weight to which they were entitled; otherwise the evidence would have been excluded as inconsistent, and the jury must have understood that it did weigh to some extent against the children, for when speaking of the objection that the deed had lain dormant for a number of years, the jury was told that this circumstance did not justify so strong an inference against the children as if they had slept upon their rights, thereby admitting that it was open to an inference against them, but not so strong as if they had been of age, and the life estate of their parents ended, and they during that delay had been in a situation to assert their rights. And should it be admitted that the judge erred in this suggestion, it would amount to no more than an intimation of his opinion upon the weight of evidence. The same remark will apply to every part of the charge when the rights of the children are spoken of in contradistinction to those of their parents. They refer to the delivery of the deed. Thus, with respect to the delay in recording the deed, the judge puts the question to the jury in this form. 'Is there anything in the fact that it was not recorded from which an inference can be drawn against the deed?' Pointing the attention of the jury to the fact of delivery, and not to any controlling distinction between the interest of the children and their parents, the bearing of the remarks of the judge with respect to the various deeds executed by Morris and his wife,

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and which are alleged to have been inconsistent with the marriage settlement, could not have misled the jury. It is true it was told that in weighing the force and effect of those acts, it must bear in mind the time when the interest vested in the children under the deed. This remark must have been understood by the jury as subject to its finding with respect to the delivery of the deed, and not as expressing an opinion that the interest of the children vested at the date of the deed. For if that had been understood as the opinion of the judge, the evidence, as before observed, would have been inadmissible, and the jury would have been told that it

could have no bearing upon the case. Instead of which it had been before explained to it that the object of his evidence was to disprove the delivery of the marriage settlement deed, and not to divest any interest that had become vested in the children. And in the conclusion of this part of the charge, the judge tells the jury"

"These are all the circumstances relied upon as being inconsistent with the settlement deed, and these are questions for you. I do not wish to interfere with your duties. It is for you to say whether the deed was duly executed and delivered."

The jury had been told in a previous part of the charge that delivery of the deed was essential in order to pass the title, and that this was a fact for it to decide, and it was in conclusion left to it in as broad a manner as could be done. The whole scope of the charge on this point left the evidence open for the full consideration of the jury, and the remarks of the judge are no more than a mere comment on the weight of evidence, and as such were addressed to the judgment of the jury, and not binding upon it. If a decided opinion had been expressed by the judge upon the weight of the evidence, it is not pretended that it would be matter of error, to be corrected here. But the charge does not even go thus far, and it is believed by a majority of the Court that it is not justly exposed to the criticisms which have been applied to it.

In respect to that part of the charge which comments upon the various deeds made by the parents which were

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relied upon as inconsistent with the settlement deed, no objection has occurred to any member of the Court except as to the comments on the deeds to Hill and Merritt and the life leases to other persons. In respect to the deeds to Hill and Merritt, one judge is of opinion that the statement "that these deeds are not inconsistent with the settlement deed" is incorrect in point of law because those deeds contained a covenant of seizin, and under the settlement deed, although

Morris and wife had a right to convey the land, they were not in the actual seizin of it, and therefore such a covenant was inconsistent with the settlement deed. But the other judges are of opinion that this part of the charge is correct because Morris and wife had, under the settlement deed, a power to convey in fee lands to a much greater amount, that it was not necessary to recite in their deeds of sale their power to sell, and that the covenant of seizin, being a usual muniment of title and not changing in the slightest degree the perfection of the title actually conveyed, did not in point of law, whether there was a seizin or not, create any repugnancy between those deeds and the settlement deed. If the parties had in those deeds recited the settlement deed and the power to convey, and had then conveyed with the same covenants, the deeds could not have been deemed in point of law inconsistent with the power under the settlement deed, but would have been deemed a good execution of the power, and the covenants a mere additional security for the title. The same judge is also of opinion that the life leases which were given in evidence, not having been made in pursuance of the power in the marriage settlement deed, are by their terms and effect so inconsistent with it as to authorize the jury to find against its delivery on this ground alone, and that the circuit court erred in charging the jury that the effect and operation of these leases was not a subject for its inquiry, and that their bearing on the cause depended on the intention of Morris.

To the other judges, however, the charge in this particular is deemed unexceptionable. The judge decided that these life leases were unauthorized by the power, and the

question was what influence they ought to have upon the point of nondelivery of the settlement deed, they not deriving any validity or force under it. Were they acts of ownership over the property which could not be explained consistently with the existence of the settlement deed, or were they acts which, though unauthorized, might fairly be presumed to be done without any intention to disclaim the legal title under that deed? In estimating this presumption, it is to be considered that these were the acts of parents, and not of strangers. That it does not necessarily follow,

because parents do unauthorized acts in relation to the estates of their children, they intend those acts as hostile or adverse to the rights of their children. Parents may, from a sincere desire to promote the interest of their children and to increase the value of their estates, make leases for the clearing and cultivation of their estates which they know to be unauthorized by law but which, at the same time, they feel an entire confidence will be confirmed by their children. The very relation in which parents stand to their children, excuses, if it does not justify, such acts. It will be rare indeed if parents may not confidently trust that their acts, done *bona fide* for the benefit of their children, will, from affection, from interest, from filial reverence, or from a respect to public opinion, be confirmed by them. The acts of parents, therefore, exceeding their legal authority admit of a very different interpretation from those of mere strangers. The question in all such cases is what were the intentions and objects of the parents? Did they act upon rights which they deemed exclusively vested in themselves, or did they act with a reference to the known interests vested in their children? It appears to the majority of the judges that the circumstance of the life leases was properly put to the jury as a question of intention, and that the jury was left at full liberty to deduce the proper conclusion from it.

The next point is as to the improvements claimed by the tenant in ejectment under the Act of New York of 1 May, 1786. That act declares

"That in all cases of purchases made of any forfeited estates in pursuance of any of the laws directing the sale of forfeited estates in which any

purchaser of such estates shall be evicted by due course of law in the manner mentioned, . . . such purchaser shall have like remedy for obtaining a compensation for the value of the improvements by him or her made on such estate, so by him or her purchased, and from which he or she shall be so evicted, as is directed in and by the first clause in the"

Act of 12 May, 1784. The latter act declares that the person or persons having obtained judgment shall not have any writ of possession, nor obtain possession of such lands, &c.;, until he, she, or they shall have paid to the person or persons possessing title thereto, derived from or under the people of the state, the value of all improvements made thereon after the passing of the act. Neither the act of 1784 nor of 1786 purports to give a universal remedy for improvements in cases of eviction by title paramount, but is confined to cases of confiscated estates where the title comes by sale from the state. However operative it may be as to citizens of the state (on which it is unnecessary to give any opinion), the question before us is whether such improvements can be claimed in this case consistently with the Treaty of Peace of 1783.

By the fifth article of that treaty, it is agreed

"That all persons who have any interest in confiscated lands, either by debts, marriage settlements, or otherwise, shall meet with no lawful impediment in the prosecution of their just rights."

By the sixth article it is agreed that

"There shall be no future confiscations made, nor any prosecutions commenced against any person or persons for or by reason of the part which he or they may have taken in the war, and that no person shall on that account suffer any future loss or damage either in his person, liberty, or property."

We think that the true effect of these provisions is to guarantee to the party all the rights and interests which he then had in confiscated and other lands in the full force and vigor which they then possessed. He was to meet with no impediment to the assertion of his just rights, and no future confiscations were to be made of his interest in any land. His just rights were at that time to have the estate, whenever it should fall into possession, free of all encumbrances or

liens for improvements created by the tenants for life or by purchasers under the state. To deny him possession, or a writ of possession until he should pay for all such improvements was an impediment to his just rights, and a confiscation *pro tanto* of his estate in the lands. The argument at the bar supposes that there is a natural equity to receive payment for all improvements made upon land. In certain cases there may be an equitable claim, but that in all cases a party is bound by natural justice to pay for improvements made against his will or without his consent is a proposition which we are not prepared to admit. We adhere to the doctrine laid down on this subject in *Green v. Biddle,* 8 Wheat. 1.

We are of opinion that the claim for improvements in this case is inconsistent with the treaty of peace, and ought to be rejected.

A number of objections of a minor nature are spread upon the record, such as exceptions to the admission of evidence to prove the common practice to convey lands by way of lease and release and the admission of the journals of the legislature; to the admission of the act of compromise between the state and John Jacob Astor; to the sufficiency of the title of Astor under the deed of the children of Morris and wife, to extinguish their title, &c.; To all these we think it unnecessary to make any further answer than that they have not escaped the attention of the Court and that the Court perceives no valid objection to the ruling of the circuit court respecting them.

Upon the whole it is the opinion of this Court that the judgment of the circuit court be and the same is hereby

Affirmed with costs.

[Footnote 1]

See *Evans v. Eaton,* 7 Wheat. 356, 20 U. S. 426 .

[Footnote 2]

See 1 Phillips on Evid. ch. 8, sec. 2, 411. 1 Stark.Evid. part 2, sec. 123, page 301, sec. 156, page 369. Com.Dig. Estoppel B. C. Evidence B. 5. Matthews on

Presumpt. 195-206, 269; Co.Litt. 352; *Mayor, &c.;, of Carlisle v. Blamire,* 8 East 487.

[Footnote 3]

See also Fairtitle v. Gilbert, 2 T. 171; *Helps v. Hereford,* 2 B. & Ald. 242; *Rees v. Lloyd,* Wightwick 123.

[Footnote 4]

But see Comm. v. Pejepscot Proprietors, 10 Mass. 155.

[Footnote 5]

See, in addition to the foregoing authorities, Buller's N.P. 254; Gilb.Evid. 100, 101; *Bean v. Parker,* 17 Mass. 591; *Wilkinson v. Scott,* 17 Mass. 244; *Inhab. Braintree v. Inhab. Hingham,* 17 Mass. 432; *Kite's Heirs v. Shrader,* 3 Litt. 447; 2 Thomas' Co.Litt. 582, note.

[Footnote 6]

See Doe v. Perryn, 3 T.R. 484; *Doe v. Martin,* 7 T.R. 83; *Bromfield v. Crowder,* N.R. 313; *Doe v. Provoost,* 4 Johns. 61.

[Footnote 7]

Jackson v. Catlin, 2 Johns. 248.